HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Chapter VIII Rule 32 (2) (b)
Description of the Case.

Criminal Misc. Application No. 998 of 2001

Date of Decision : 29th March, 2006

~~A.F.R. (Approved for reporting)~~

Not approved for reporting.

Date Initial of Judge.

Note: Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

Delay Condonation Appl. No. 1254 of 2005
In
Recall Application No. 1253 of 2005
In
Criminal Miscellaneous Application No. 998 of 2001

1. J.M.D. Paints Industries
Hindan Vihar, Street No. 2
Water Pump No. – 1,
Delhi Meerut Mor,Ghaziabad

2. Rajeev Kumar Garg, Proprietor
M/s J.M.D. Paints Industries
Hindan Vihar, Street No. 2,
Water Pump No. – 1,
Delhi Meerut Mor, Ghaziabad … Applicants

Versus

1. State of Uttaranchal
2. Sunil Kumar Gupta
S/o Sri Vigyan Prakash Gupta
R/o 90, Raj Road, Dehradun … Respondents

Sri B.P. Nautiyal, learned counsel for the applicants
Sri A. Rab, Addl. G.A. and Sri Chaudhary Sudhir Kumar, A.G.A. for the State

Hon'ble J.C.S. Rawat, J.

Case called out. None is appearing for the respondent No. 2 inspite of the service.

Ground shown in delay condonation application is sufficient. Accordingly, the delay is condoned.

Ground shown in the recall application is sufficient. Accordingly the order dated 07.12.2004 is recalled and the petition is restored in its original number.

The present petition has been directed to quash the proceedings of criminal case No. 139 of 1998 Sunil Kumar Vs. J.M.D. Paints Industry and others pending before the court of J.M. (I), Dehradun.

Brief facts for the disposal of this petition are that a complaint was filed u/s 138 of the N.I.Act, 1881 before the Magistrate. It is alleged in the complaint that the cheque given by the applicants to the complainant and the said cheque was dishonoured on the ground of insufficient funds. Thereafter notice was given and the complaint was filed. The Magistrate took the evidence u/s 200 and 202 Cr.P.C. and thereafter took the cognizance u/s 138 of the N.I. Act.

Feeling aggrieved by the said order, an objection was filed before the trial court for recalling the cognizance order passed by the Magistrate. The learned Magistrate dismissed the same objection and maintained his cognizance order.

Feeling aggrieved by the said order, the applicants preferred revision petition before the learned Sessions Judge, Dehradun which was transferred to the Addl. Sessions Judge (F.T.C.) who held that there was a prima-facie case against the accused-applicants and dismissed the revision.

Feeling aggrieved by the said order, the present petition has been filed before this court.

Heard Sri B.M. Bhatia holding brief of Sri B.P. Nautiyal and the learned Addl. G.A.

At the outset, I would like to point out that the law which was existing at the time of filing the complaint is **M/s K.M. Mathew Vs. State of Kerala (1992) 1 SCC 217** and thereafter the position of law has changed in view of **Adalat Prasad Vs. Rooplal Jindal & others (2004) 7 SCC p/338 and Subramanium Sethuraman Vs. State of Maharastra, 2005 Supreme Court Cases (Cri) p/242.**

Now the law as existing today is that if the cognizance has been taken by the Magistrate against the accused, the Magistrate has no power to review its order. The only remedy is available to the applicant is to file petition u/s 482 Cr.P.C. before the High Court.

On merit, the learned counsel for the applicants contended that the case is not made out against the applicants without a complaint of provision of Section 138 of N.I.Act. It was further contended that the complaint did not disclose the date of service of notice sent to the

applicants. It was further contended that it is obligatory on the part of the complainant to mention the date of service of notice in the complaint. Learned Sessions Judge while dealing with this point has held that the trial court will consider this point during the trial as to whether service was effected upon the applicant or what was the date of the service of the notice, this facts relates to evidence. The complainant will adduce the evidence during trial to prove the date of service of notice. I am completely in agreement with the findings recorded by the learned Sessions Judge. This court cannot go into the controversy as to whether the notice was served upon the applicants or not. This fact can only be ascertained by evidence during the trial. It was further contended on behalf of learned counsel for the applicants that the applicants had given a blank cheque to his brother and that cheque anyway misplaced and it was received to the complainant has filed the complaint and he adduced the evidence pertaining the veracity of the facts stated in the complaint. The version which has been placed before this court, as a matter of fact is the matter of defence of the accused/applicants. There are two version before this court. The court has to accept one version. It can only be decided by the trial court. The disputed question of fact cannot be decided by this court at this stage. Learned counsel for the applicants further contended that the firm M/s J.M.D. Paints Industries was not in existent on 20.02.1998 when the complaint was filed in the court. The said firm was not registered at that time. The said cheque is disputed and could not have been issued by the firm. This is also the question of disputed fact which can only be decided during the trial.

However, the accused-applicants are at liberty to raise these pleas before the trial court. The accused-applicants may raise all the pleas which have been raised this court or in the petition filed before this court before the trail court during the trial. The trial court without being influenced by the findings given by this court and the

learned Addl. Sessions Judge may pass the suitable order with regard to these pleas in the said trial.

In view of the forgoing discussion, the petition deserves to be dismissed and the same is accordingly dismissed.

(J.C.S. RAWAT, J.)

29th March, 2006
Shiv